IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10446 of 1999
with
SPECIAL CIVIL APPLICATION NO. 10604/99 & 96/2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GRUH FINANCE LTD

Versus

JOINT COMMISSIONER OF INCOME TAX (ASSESSMENT)

Appearance:

MR JP SHAH for Petitioner

MR MIHIR JOSHI WITH MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE C.K.BUCH

Date of decision: 02/02/2000

COMMON JUDGEMENT (PER : J.N.BHATT, J)

1. In this group of three petitions, at the stage of show cause notice, the petitioners-assessees, have invoked extraordinary, plenery, equitable and discretionary jurisdiction of High Court under Article 226 of the Constitution of India, a common question has surfaced for our consideration and adjudication i.e. whether in exercise of powers by the respondent authority, for reassessment and resultant notices under section 148 of the Income Tax Act, 1961 to the petitioners, at this stage, prima facie, could be said to be based on "change of opinion" or on new opinion on finding out mistake upon the existing material or could it be said that there is total lack of jurisdiction ?

2. The case of the petitioner in each petition is that the impugned notice is without jurisdiction, as re-assessment cannot be made on the basis of "change of opinion" since all the relevant facts and entire material had been considered by the Assessing Officer, at the relevant time. Whereas, revenue has contended that assessee has claimed depreciation as deduction on non-exisatant machinery and bogus claim was found and depreciation, thereon, claimed was not, consciously, considered. Therefore, there is no question of bar of the jurisdiction.

3. We have heard, extensively, the rival submissions made on behalf of the parties and materials emerging from record in light of the relevant proposition of law.

4. It is true that even after the amendment in the provisions of Sec.147 of the I.T.Act, 1961, a mere change of opinion, ipso-facto, would not confer or empower the Assessing Officer to embarke upon reassessment exercise. Notwithstanding that, power to make assessment or reassessment within four years of the end of the relevant assessment year, would be attracted even in the cases where there has been complete disclosure of all relevant facts upon which the assessment might have been based at the first instance, but for or in case of a mistake, as per amended provisions of sec.147 of I.T. Act.

5. The assessment of the return for the relevant years has been done under sec.143(3) of the I.T.Act. Record of these petitions indicates the order dated 24.11.1999, placed along with the affidavit-in-reply. It is the order showing reasons for issuance of notice under sec. 148 of I.T.A. which reads as under :-

" As per the information received from DDI (Inv.) Unit-II, Khanpur under No. F.No. G-18/DD-II/KNP/2(35)/98-99 dated 19.6.1999, it is seen that assessee during the F.Y. 1995-96 corresponding to A.Y. 1996-97 purchased and leased the machinery (Sheltting Line Tube Mill)

amounting to Rs. 1,47,81,250/ to Rajendra Group of Companies and claimed depreciation as deduction against its income in respect of machinery that either did not exist or the real worth of these machinery was only 10% to 20% of the value recorded in the books. In this way the assessee has claimed bogus depreciation on nonexistent machinery. Since the above amount of income appears to be escaped from taxable income for A.Y. 1996-97. It is mandatory to issue notice u/s 148 of the I.T.Act to cover the above income and tax the same accordingly, a notice u/s 148 is, therefore, issued to the assessee for this purpose. "

6. It could very well be seen from the aforesaid reasons that depreciation claimed on the machinery which was non-existent, as per the information received by the department, whereas, in scrutiny assessment, depreciation under sec.32 r/w sec.43(6) of the I.T. Act had been claimed and accepted. Thus, it was noticed that there was a bogus claim and mistake was discovered.

7. Expression "reason to believe" employed in sec.147 of the I.T.Act would mean some cause or justification if the competent authority has a cause or ground or some justification that some income has escaped assessment or that there was a mistake in making assessment. In the peculiar facts and special circumstances emerging from the record, we are extremely unable to uphold the contention raised on behalf of the petitioner that the respondent authority has no jurisdiction to issue impugned notices under sec. 148 of the Income Tax Act, 1961 as it involved only a mere "change of opinion".

8. This Court, in " Praful Chunilal Patel & Ors. v/s A.C.T., 236 ITR 832," has observed in this behalf while interpreting the provisions of sec.147 of the I.T. Act and expression " reason to believe " which are relied on on behalf of the respondents, are also material for reinforcing the view which we are taking in this group of petitions.

9. Whereas, learned Counsel for the Assessee has placed reliance on the observations made by this Court in the decision in "Garden Silk Mills Pvt. Ltd. v/s Deputy Commissioner of Income-tax, 237 ITR 668. He placed reliance on relevant observations at page 673 which read as under :-

" Even the decision of this Court in Garden Silk Mills Ltd. v. Deputy CIT (Asst.) (No.1) (1996) 222 ITR 27 cannot assist the petitioner because in that case it was held that the

Assessing Officer was aware about the investment and fluctuations in the exchange rate and depreciation had been allowed after considering the material on record and further that the notice was issued after four years and there was

ure on the part of the assessee to disclose material facts necessary for assessment. Reliance placed on the case of that very assessee, reported in the same volume at page 68 Garden Silk Mills Ltd. v. Deputy CIT (No.2) (1996) 222 ITR 68 (Guj), also cannot help the petitioner, because in that case the court found that in the first assessment the Assessing Officer had applied his mind in the computation of income and that there cannot be a mere change of opinion. When, at the first assessment all the relevant aspects are considered and there is proper application of mind for ascertainment of the amount of taxable income and of the tax payable thereon, then in the absence of any error or mistake being discovered or found, the Assessing Officer later on cannot merely for the sake of giving a different opinion, change the earlier opinion. However, in cases where an error or mistake is detected, it can never be said that there is only a mere change of opinion. The mistake or error which is detected and which constituted a valid decision or cause to form a belief in the first assessment as a result of which the income has escaped assessment, would constitute a reason to believe that the income had escaped assessment and such cases where mistake and errors are detected and which constitute a valid justification or cause to form a belief sought to be corrected, cannot be said to be cases of mere change of opinion."

" We are in respectful agreement with the aforesaid enunciation of distinction between the change of opinion and finding erroneous nature of earlier assessment on detection of mistake on an issue which was not earlier considered by the Assessing Officer. The present case may be examined in the light of the principles noticed above. No return has been filed. However, the reasons recorded by the Assessing Officer has been placed on record which are identical in all the three cases except for the amount and the name of the assessee."

10. We have also, seriously, considered the entire case-law from which aforesaid paragraphs are relied on. In so far as expression "reason to believe" and "change of opinion" are concerned, we are of the view that though the material was available on record, at the time of

first assessment, when no conscious consideration of the material is made and a mistake has been committed, it would not, in any case, create an embargo or a ban on the competent officer to exercise powers under the amended sec. 147 of the Income Tax Act, 1961, as prima facie, there could not be "change of opinion" in that factual scenario. It has also not been shown to us on behalf of an assessee. If conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making assessment and again different or divergent view is sought, it would tantamount to "change of opinion", whereas, in the case of existing material, no conscious attempt has been made, it would tantamount to mistake in not considering the relevant point or proposition and it would not be a "change of opinion". As in the present case, prima facie upon information, the department noticed that depreciation was claimed and approved in respect of a machinery which was not at all in existence and that aspect was not, consciously, considered, at the time of first assessment, as otherwise there was no question of granting depreciation, thereon, claimed by the assessee.

11. In our, prima facie view, therefore, this group is also covered by the observations and ultimate view taken by this Court in Praful Chunilal Patel's case, 236 ITR 832. We need not divulge ourselves further on meticulous discussion. Otherwise also, there is no fit case for exercise of extraordinary juisdiction under Article 226 of the Constitution, in absence of any jurisdictional issue. Authority has jurisdiction.

11. Learned counsel Mr. Shah, at this stage, submitted that since again the competent authority is required to examine the merits after giving an opportunity of hearing to the assessee, and material, it may be observed that the observations made, herein before, may not come in the way of the point/issue being decided on merits as ours is a prima facie view in absence of material. In fact, this requires no clarification, as such. However, this Court has dealt with the point prima facie, at the interim stage, i.e. at the stage of issuance of notice under sec.148 of the I.T.Act, where the party has to appear and show cause, the decision on merits will be upon the material that may be placed/submitted. So, observations made, at this stage, obviously, would not and should not influence and colour the vision of the competent authority while making final decision upon merits after hearing and considering the materials.

13. In the result, these petitions are dismissed.Notice in each petition shall stand discharged. Obviously, interim relief, if any, would not assume any

survival value. No order as to costs.

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